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By ECF

November 16, 2021

The Honorable Norman K. Moon
United States District Court
Western District of Virginia
255 West Main Street
Charlottesville, VA 22902

Re: *Sines et al. v. Kessler et al.*, No. 3:17-cv-00072 (NKM) (JCH)

Dear Judge Moon:

We write regarding correspondence received from Richard Spencer yesterday stating his intention to call an undisclosed witness, Hannah Brown (a/k/a Hannah Zarski), and his attempt to introduce into evidence a document composed entirely of hearsay. The Court should preclude Ms. Brown from testifying and rule the document inadmissible.

A. The Court Should Preclude Mr. Spencer from Calling Ms. Brown as a Witness.

Mr. Spencer failed to identify Ms. Brown as a witness in violation of Federal Rule of Civil Procedure 26(a)(1) and in violation of the Court's order to exchange witness lists no later than September 7, 2021. ECF No. 991. While some witnesses were identified late in the process, they were either made available for deposition or withdrawn. In fact, Mr. Kolenich (not Mr. Spencer) identified Ms. Brown as a potential witness in the weeks preceding trial, and Plaintiffs asked to depose her as a remedy for the late identification. Mr. Kolenich withdrew Ms. Brown as a witness, so Plaintiffs did not depose her. No other party identified Ms. Brown or listed her as a witness.

Where, as here, a party violates disclosure requirements, that "party is not allowed to use that . . . witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). This exclusionary rule is intended to provide "a strong inducement for disclosure of material," *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003), and to "prevent 'surprise and prejudice to the opposing party.'" *Metamining, Inc. v. Barnette*, 2013 WL 3245355, at *7 (W.D. Va. June 26, 2013) (citing *Southern States*, 318 F.3d at 596)

Mr. Spencer never identified Ms. Brown in his initial disclosures or in any other discovery, he did not identify Ms. Brown on his witness list, and he did not make her available

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for deposition prior to trial. For these reasons, the Court should exclude her as a witness. *Southern States*, 318 F.3d at 596; *Metamining, Inc.*, 2013 WL 3245355, at *7.

Plainly, there is no way to cure the late notice by deposing Ms. Brown before trial. *See Henderson v. Corelogic Nat'l Background Data, LLC*, 2016 WL 4611571, at *7 (E.D. Va. 2016) (opposing party could not "cure the surprise" because it did not have the opportunity to depose the undisclosed witness). And it would be unfair to force Plaintiffs to "divert their time, energy, and resources away from trial preparation" to depose the disclosed witnesses even shortly before trial – let alone in the last week of trial. *Scott v. Clarke*, 2014 WL 5386882, at *2 (W.D. Va. Oct. 22, 2014) (Moon, J.). "[A]llowing such an untimely disclosure would be disruptive to the trial . . . because it would condone the strategy of last-minute disclosures, behavior that flies in the face of the Federal Rules of Civil Procedure." *Slaughter v. Barton*, 2003 WL 24100297, at *3 (W.D. Va. 2003) (Moon, J.).[1]

B. The Court Should Rule the Document Inadmissible.

The Court also should not permit Mr. Spencer to use a document composed of inadmissible hearsay and hearsay-within-hearsay. The document purports to be a long series of chats on Facebook with the title "The Coup" and listing as participants "Ty Smith," "Hannah Brown," "Facebook User," and another "Facebook User." The document is entirely composed of hearsay, as all the statements in the document are out of Court statements offered for their truth and are thus inadmissible. *See* Fed. R. Evid. 801, 802. Plaintiffs also note the document contains many instances of hearsay within hearsay, neither level of which can be addressed by a relevant exception. *See* Fed R. Evid. 805. Mr. Spencer has offered no basis for admitting this document, and there does not appear to be any valid basis for its admission. Accordingly, Plaintiffs respectfully request that this Court rule the document inadmissible.

Respectfully,

David E. Mills (*pro hac vice*)

[1] There is no "harmlessness or substantial justification" for Mr. Spencer's delay. *See W.C. Eng., Inc. v. Rummel, Klepper & Kahl, LLP*, 2020 WL 534532, at *4 (W.D. Va. 2020) (citing *Southern States*, 318 F.3d at 596). To find a late witness disclosure harmless, the Court must consider: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence. *Benjamin v. Sparks*, 986 F.3d 332, 343 (4th Cir. 2021) (citing *Bresler v. Wilmington Tr. Co.*, 855 F.3d, 178, 190 (4th Cir. 2017)). "The first four factors primarily relate to the harmlessness exception, while the fifth factor primarily relates to whether the violation was substantially justified." *Id*. None of these factors weighs in Mr. Spencer's favor.

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CERTIFICATE OF SERVICE

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/s/ David E. Mills
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